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Chairman:	Mr. Politi	(Italy)
later:	Mr. Ekedede (Vice-Chairman)	(Nigeria)
later:	Mr. Politi (Chairman)	(Italy)

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00-72708 (E)

The meeting was called to order at 10.10 a.m.

Agenda item 159: Report of the International Law Commission on the work of its fifty-second session (*continued*) (A/55/10)

1. **Mr. Becker** (Israel), referring to the topic of reservations to treaties, said that it was unclear whether the purpose of the Guide to Practice was to assemble and codify existing practice regarding reservations to treaties and to provide guiding principles for the interpretation of the Vienna Conventions of 1969 and 1986, or to supplement the Vienna Conventions by adding norms and principles not specifically provided for therein. The Commission should clarify that matter before it proceeded to work on other aspects of the topic.

2. It should also be noted that in their studies and proposals, the Special Rapporteur and the Commission had relied, inter alia, on the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, which was not yet in force. His delegation supported those who questioned whether, under those circumstances, the Guide should refer to international organizations.

3. His delegation was concerned at the proposed drafting of guidelines 1.7.1 and 1.7.2, according to which two or more States or international organizations could conclude an agreement purporting to exclude or modify the legal effects of certain provisions of a treaty to which they were parties or to specify or clarify the meaning or scope of that treaty. The draft guidelines appeared to grant the parties unduly broad discretion to modify the provisions of the treaty. They thus risked being interpreted as allowing the parties to conclude an agreement which contravened some provisions of the treaty or undermined its main objectives. Limitations on the power to modify the provisions of a treaty should be referred to specifically in the guidelines, since they were not always provided for in the treaty itself. Draft guidelines 1.7.1 and 1.7.2 should therefore be amended to ensure that their terms were consistent with the Vienna Convention on the Law of Treaties.

4. Turning to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, he said that it was not necessary for the draft articles to take the form of a convention. Since the obligations of conduct that were the object of the draft articles must be translated into actions designed to prevent harmful activities affecting neighbouring States, it would be more appropriate to draft guidelines that could form the basis for more detailed regional arrangements between the parties concerned.

5. Lastly, with regard to the long-term programme of work of the Commission, his delegation cautioned against the adoption of an overly ambitious agenda that could prevent the Commission from concluding the various topics on its agenda in a timely fashion. Preference should be given to the topic of "Risks ensuing from fragmentation of international law". His delegation would also welcome study of the topic of "Responsibility of international organizations". Special attention should be given to the legal consequences of ultra vires acts committed by international organizations.

6. **Ms. Papapoulou** (Netherlands) said she regretted that the fifth report on reservations to treaties (A/CN.4/508/Add.3 and Add.4) dwelt too much on interpretations of the law on reservations that had already been fully agreed. Her delegation urged the Commission to develop its work on the controversial issues that remained to be settled. Even rules that at face value were merely procedural, to which the Special Rapporteur had devoted considerable attention, could have major consequences at the level of substantive law. One such rule was that of interpretative declarations, which the Special Rapporteur had rightly said could be dealt with meaningfully only once a general discussion of reservations had taken place. He had also been correct in stating that "conditional interpretative declarations" were similar to reservations proper. It was, however, incorrect to say that the former were not covered by the Vienna Convention on the Law of Treaties, article 2, paragraph 1 (d), of which defined a reservation as a "unilateral statement, however phrased or named". Even if it was agreed that the Guide to Practice should contain rules on interpretative declarations, that should not imply the recognition of conditional interpretative declarations as a distinct legal category. They were merely a concept that facilitated the understanding of statements within the system of the law on reservations. To treat them as a separate category would simply create confusion rather than transparency, as well as serving to condone a practice that had largely developed as a way of circumventing

the rules of the law of treaties. It would also blur the law on reservations, to which they were similar, and might seem to legitimize the use of such declarations to circumvent existing rules on the formulation of reservations. A guideline indicating under what circumstances an interpretative declaration should be understood to be a reservation to which the guidelines would apply would be sufficient. It followed that for her delegation draft guidelines 2.4.4, 2.4.5 and 2.4.6 were not acceptable.

7. It was important to maintain the rule that reservations could be made only at the time of expressing consent to be bound. Even if the Special Rapporteur was correct in his understanding that reservations made after that time could be accepted if the treaty so provided, it did not seem a good idea to appear to advocate that option through the formulation of a guideline.

8. The discussion of late reservations unfortunately made no distinction between a completely new reservation and a reservation that was reformulated, in the sense of being partially withdrawn. Yet the legal implications of the two actions were quite different: the first related to a limitation of the obligations under the treaty concerned, whereas the latter implied an increased acceptance of previously restricted obligations. Her delegation suggested the formulation of a guideline dealing with the acceptability of "late reservations having the character of a partial withdrawal", which would highlight the desirability of reserving States taking such action. At the same time, it should be made clear that completely new reservations could not be made after consent to be bound had been expressed. The practice of the Secretary-General acting as a depositary with regard to changes in reservations was unfortunate, for it deviated from the rules of the law of treaties in that "late" reservations were nonetheless circulated, and that the Secretariat did not distinguish between "late" reservations having the character of a partial withdrawal and completely new reservations. Indeed, her delegation wondered whether the depositary was under an obligation to circulate a late reservation at all, for returning it to its author would seem to be quite acceptable within the law on reservations. The views expressed by the legal division of the Council of Europe were far more appropriate to the system of the law of treaties.

9. The lawfulness of reservations was the most crucial question in the current debate, which should no longer be postponed. Attention should be given both to the implications of unlawful reservations and to the legal consequences of conditional interpretative declarations in connection with treaties which explicitly prohibited reservations. Many such declarations were made in contemporary treaty practice, the United Nations Convention on the Law of the Sea being a case in point. The proper view would seem to be that the prohibition of reservations should include conditional interpretative declarations; yet such declarations had been circulated by the Secretariat as depositary, thereby possibly creating the impression that they could be accepted by other States Parties. The Special Rapporteur should therefore reflect on the role of the depositary, particularly with regard to reservations that were not acceptable in terms of the law of treaties. Very often the position taken by the depositary influenced the perception of States as to the acceptability or legality of certain reservations. The question was whether the depositary could play a proactive role in the "management" of the issue of reservations and, if so, on which rules of the law of treaties that would be based. In that context, the question whether States were the only guardians of a treaty, or whether the depositary also had a role to play, should be answered.

10. **Mr. Al-Baharna** (Bahrain), speaking on the topic of international liability, said that many conflicting views on prevention and liability had been expressed since the emergence of the topic in 1978, unfortunately without conclusive results. The Commission's decision in 1997 to consider the two aspects separately, on the grounds that, although related, they were distinct from one another, had enabled the Special Rapporteur to produce a more streamlined version of the draft articles on prevention. Indeed, his delegation feared that the text might be too concise. The time for debating such aspects of the topic being long gone, he would draw attention to just a few of the main issues involved. First, the phrase "not prohibited by international law" in draft article 1 was crucial to the legal distinction — long recognized by the Commission itself — between international liability and State responsibility. His delegation was therefore opposed to any suggestion that the phrase should be deleted. Otherwise, the whole text might need to be revised. Secondly, arguments about the expression "significant harm" had run their course. By and large, it had been accepted as the most appropriate term and indeed appeared in the Convention on the Law of the Non-navigational Uses

of International Watercourses. The definition of the expression "risk of causing significant transboundary harm" in draft article 2 (a) was, although still confusing, acceptable. He would therefore also prefer to replace the word "disastrous", in the same subparagraph, by "significant".

11. The much-debated term "due diligence", as used in draft article 3, meant a diligence proportional to the magnitude of the subject and to the dignity and strength of the Power which was to exercise it, or alternatively to such care as Governments ordinarily employed in their domestic concerns. He drew attention to paragraph 24 of the second report of the Special Rapporteur (A/CN.4/501), which outlined ways in which States might fail to comply with their duty of due diligence. Some States strongly held the view that a breach of that duty could give rise to consequences in the field of State responsibility only. The Government of China had stated that failure to comply would not entail any liability in the absence of damage. Once damage had occurred, however, State responsibility or civil liability or both might come into play. In cases where a State complied with its duties of due diligence, yet damage occurred nevertheless, the operator should accept the liability. On the whole, draft article 3 was acceptable, on the understanding that the duty of prevention was a duty of due diligence, even though the latter phrase was not explicitly mentioned in the draft article. The phrase "appropriate measures" should be sufficient for the purpose of the topic of prevention, since the same phrase appeared in article 7 of the Convention on the Law of the Non-navigational Uses of International Watercourses.

12. He reiterated the importance of the second part of the topic, international liability, which should be dealt with as soon as the draft articles on prevention were finally approved. There was a wealth of material to draw on, including the useful ideas developed by the former Special Rapporteur. Lastly, he said that draft article 19 was incomplete and required some improvement: a framework convention on prevention should contain specific provisions on the settlement of disputes, even though the Special Rapporteur had recommended its retention without change, on the grounds that it had generally met with the approval of Governments.

13. **Mr. Rogachev** (Russian Federation) noted that the preamble to the draft Convention on the Prevention of Significant Transboundary Harm referred only to General Assembly documents, or "soft" law, although there was a whole range of international instruments that could provide a hard legal basis for the draft. However, the text had successfully achieved one of its aims, which was to balance the interests of the State of origin and the States likely to be affected.

14. The duty of prevention was one of conduct, not result. A breach of that duty was therefore a matter of State responsibility, regardless of whether harm had occurred. If it had, the rules governing liability came into play, as well as State responsibility. It was, however, difficult to settle the question of liability for transboundary harm without reference to specific forms of hazardous activity that could give rise to such harm. The adoption of residual rules would not solve the problem of compensation. Moreover, draft article 19 on the settlement of disputes should be further elaborated.

15. With regard to its long-term programme of work, the Commission had been right to give priority to the topic "Responsibility of international organizations", given the globalization of international relations. Much depended on the international organizations themselves, which were growing in number, while their mandates were growing ever more extensive. Yet their legal status was far less clearly defined than that of States. It might therefore be worth also considering the associated topic of the legal status and capacity of international organizations. The topic "Effects of armed conflicts on treaties", although worth consideration, was significantly less important. "Shared natural resources of States", on the other hand, was of considerable practical significance. As for "Expulsion of aliens", the Commission should give serious thought to the question whether it was an appropriate topic, given that, as a human rights issue, its codification was being undertaken by other international bodies. The topic "Risks ensuing from fragmentation of international law" was extremely important: a large number of international bodies were involved in codifying various branches of international law, yet had practically no contact with each other or with the Commission. A real danger of fragmentation therefore existed, as Governments and scholars had frequently pointed out. It was not clear, however, what form the Commission's work on the topic would take.

16. In addition to the topics suggested by the Planning Group, his delegation would recommend the consideration of the topics "Non-discrimination in international law" and "The precautionary principle".

Nor should the Commission lose sight of the topic "Law of the peaceful settlement of international disputes", which had been removed from the draft articles on State responsibility; the absence of clear rules had given rise to a whole range of ill-coordinated special regimes, thus providing, incidentally, confirmation of the need to study the risks ensuing from the fragmentation of international law.

17. **Mr. Biato** (Brazil), referring to the topic of reservations to treaties, said that his delegation was looking forward to the suggestions that the Special Rapporteur might wish to make concerning the validity and effects of reservations and objections to them. The exceptional nature of late reservations must be stressed; his delegation therefore supported the proposal in the Guide to Practice that late reservations should be accepted only if there was unanimous and prior consent on the part of all parties to the treaty. The increase from three to 12 months in the time limit stipulated by the Secretary-General for States to express their objections to such reservations was a commendable step in that regard.

18. Turning to the topic of international liability, he endorsed the report's emphasis on the relationship between a balanced and fair regard for the interests of States and the need for effective implementation of the duty of due diligence. He noted with satisfaction that the draft in its preamble addressed the concern of many States in respect of the right to development and did so by proposing a trade-off between the imperatives of ensuring economic growth and the issues arising from hazardous activities, especially those which might have an environmental impact. If the due diligence principle was to be put into practice in an equitable and meaningful way, it must not be detached from development issues and, more specifically, the need for capacity-building and technology transfer. Those matters must be taken into account in the application of the articles dealing with appropriate measures and the standards centred on the notion of best available technology. While stressing his delegation's satisfaction that the Commission was close to completing its work on the issue of prevention, he urged the Commission not to lose sight of the need to address the issue of liability, without which the work would not be complete. His delegation was in favour of retaining the phrase "activities not prohibited by international law" in the title of the draft articles.

19. With regard to the Commission's long-term programme of work, his delegation emphasized that the Commission should concentrate initially on the topics currently under consideration. As to the new themes proposed, the Commission should have a clear set of priorities. Among the topics singled out in the report, "The fragmentation of international law" was of considerable relevance and would merit study in depth, although it was not a subject for codification. His delegation would also like to see the topic "International responsibility of international organizations" become a priority issue. "The position of the individual in international law", a topic suggested by Mexico, also merited consideration.

20. *Mr. Ekedede (Nigeria), Vice-Chairman, took the Chair.*

21. **Mr. Pitta e Cunha** (Portugal), referring to chapter V of the report, concurred with the Special Rapporteur that the international protection of human rights was an issue distinct from diplomatic protection. While diplomatic protection might complement human rights protection, the latter was a duty of the international community imposed by erga omnes norms, independently of nationality.

22. His delegation welcomed the fact that draft article 2 on the use of force in the exercise of diplomatic protection had not received the Commission's support. It shared the view that the question of the use of force was not part of the topic and lay outside the Commission's mandate. His delegation preferred to emphasize peaceful methods of dispute settlement in protecting the rights of nationals who had suffered injury in another State.

23. Draft article 3 reflected international practice in defining diplomatic protection as a right of the State. During the discussions on the issue it had been pointed out that the recognition in international law of direct individual rights had not undermined the traditional doctrine of diplomatic protection. While agreeing with that assertion, his delegation also could not deny the growing trend in domestic law towards limiting the discretionary element of such a prerogative. While not advocating the adoption of draft article 4, his delegation considered that at the level of international law, greater attention should be focused on the way in which diplomatic protection operated and on the effect of the relationship between the State of the injured individual and the State which had committed the

internationally wrongful act, and less on the nature of the right in itself. For that reason, the phrase declaring that the State of nationality had discretion in the exercise of diplomatic protection should not be retained in draft article 3.

24. In relation to issues of nationality in the context of diplomatic protection, his delegation generally supported the approach taken by the Special Rapporteur. The question of an effective link was particularly relevant in the event of dual or multiple nationality. As noted by other delegations, when there was only one nationality at stake, it should not be strictly necessary for a State wishing to exercise diplomatic protection for the benefit of a given national to prove the existence of an effective link. Otherwise, individuals could be deprived of diplomatic protection. His delegation shared the view that the topic under consideration was about diplomatic protection, not acquisition of nationality and, therefore, the draft articles should not attempt to define how a State could grant nationality to individuals.

25. Lastly, his delegation concurred with the formulation of draft article 8 dealing with diplomatic protection of stateless persons or refugees by the State of residence. That formulation should meet the concerns expressed by some members of the Commission since it followed the approach that the exercise of diplomatic protection was a prerogative of States. The provision represented an instance of development of international law as warranted by contemporary international law, which could not be indifferent to the plight of refugees and stateless persons.

26. Turning to chapter VII of the report, he said that his delegation attached the greatest importance to the completion of the draft guidelines on reservations to treaties, which could be of practical benefit to the international community in the implementation of the legal regime established by the Vienna Convention on the Law of Treaties. They should also reflect the existing practice of Governments and international organizations concerning reservations and declarations relating to treaties.

27. Other aspects should also be covered in the Commission's study, namely, the permissibility of reservations and the legal effects of objections. Specifically, his delegation agreed that modifications of reservations adding new limitations must follow the unanimity principle for their acceptance, as proposed by the Special Rapporteur in draft guideline 2.3.3. However, a partial withdrawal of a reservation should be treated differently. In such a case the objection should be effective only between the objecting State and the State which made the partial withdrawal of the reservation. For non-objecting States the partial withdrawal would remain valid. The importance of the issue was underscored in the case of human rights treaties, in view of the number of reservations currently being made and their effect on the rights and freedoms of individuals.

28. With regard to chapter VIII, his delegation believed that it was time for the Commission to proceed with the decision taken at its forty-ninth session, namely, to deal with the question of liability, in accordance with General Assembly resolution 54/111. His delegation welcomed any legal development which might increase the commitment to preventive action designed to avoid harm, particularly when such harm involved environmental damage. It also believed, however, that a breach of due diligence obligations required an equitable and adequate response, including compensation if harmful consequences occurred. Accordingly, the Commission should address the question of the liability regime to be established when actual harm occurred despite the implementation of preventive measures.

29. His delegation concurred with those that preferred a cautious approach to the question of the phrase "acts not prohibited by international law". While agreeing that prevention was a matter essentially of risk management irrespective of whether the activities in question were or were not prohibited by international law, his delegation also found merit in the arguments against the deletion of that phrase, including the need to keep the link between the rules regulating the duty of prevention and those governing international liability as a whole.

30. His delegation wished to see included in the Commission's work consideration of the issue of harm caused to areas beyond national jurisdiction or to the so-called global commons.

31. His delegation welcomed revised draft article 7 containing the word "environmental" and would prefer to add the word "impact" before "assessment", the better to clarify the nature of the environmental assessment referred to.

32. His delegation also concurred with those that supported further revision of the draft articles to incorporate new developments of international law, with special emphasis on the precautionary principle. While the theme of prevention in itself and the requirement of environmental impact assessments pointed towards that already established principle, his delegation felt that the precautionary principle should be mentioned explicitly in a future convention that purported to deal with prevention of transboundary harm from hazardous activities. Consideration should also be given to the concepts of best available technology and best environmental practices.

33. Lastly, his delegation supported the introduction of draft articles 16 and 17 concerning contingency measures or measures of preparedness.

34. **Ms. Di Felice** (Venezuela), referring to chapter VIII of the report, said that once the current phase of its study was completed, the Commission should initiate the consideration of international liability, as contemplated in paragraph 671 of the report. In that connection, consideration should be given to the work already carried out on the topic of State responsibility.

35. One of the characteristics of the rules proposed for adoption was the nature of the obligations, which in some cases were obligations more of result than of conduct. In other cases the obligations appeared to be unclear because of the difficulty of defining such terms as significant transboundary harm, due diligence and an equitable balance of interests.

36. Draft article 1 dealt adequately with two basic issues, since it stated that the draft applied to activities not prohibited by international law and that those activities involved a risk of causing significant transboundary harm.

37. Draft article 4 on the obligation to cooperate referred correctly to the possibility that the assistance of competent international organizations might be sought; the term "assistance" clarified the scope of participation of such organizations in the prevention or minimization of transboundary harm.

38. Her delegation fully supported the approach envisaged in draft article 19, on the settlement of disputes concerning the interpretation or application of the draft articles, according to which the choice of method would be based on the mutual agreement of the parties and would, in the absence of such agreement, permit the establishment of an independent commission whose findings would be of a recommendatory nature.

39. **Mr. Uykur** (Turkey) said that his delegation's views on the topic of international liability had been reflected in the Secretary-General's report (A/CN.4/509). For Turkey, cooperation among States for the protection of the environment was an aspect of the maintenance of friendly relations. The formation and application, at the international level, of rules to prevent transboundary harm arising from hazardous activities would establish a framework for the protection of the environment at the regional level. Such rules should be based on mutual understanding and respect for each State's rights, especially their sovereign rights. Acceptable rules could be codified by following those principles, which had shaped the customary law rules on the subject. It would be risky to follow the path taken by some previous international conventions which had not gained the support of the international community as a whole, and could not be deemed to reflect the rules of customary international law. For instance, any mechanism which contemplated giving potentially affected States a right of veto over activities planned by other States would be unacceptable in any form, since it would create an inequality between the two categories of States.

40. He welcomed the inclusion in the draft articles of the second preambular paragraph, referring to permanent sovereignty over natural resources. That was a basic principle which should be incorporated in any international instrument governing the use of those resources. The fifth preambular paragraph was ambiguous, since it might imply a limitation on the jurisdiction of States over their own territory, a proposition which he could not accept. The difficulty should be overcome by referring instead to the principle of responsible and sustainable use and management of natural resources. Draft article 5, on implementation, envisaged the establishment of monitoring mechanisms. A monitoring body set up by the State of origin could fulfil that function, as long as it operated efficiently. In draft article 7, the insertion of the words "in particular" highlighted the assessment of the possible transboundary harm which might be caused by an activity. He queried the emphasis placed on that aspect, as compared with other legitimate concerns of the State of origin, such as the importance of the activity in question for the development of the whole region, including neighbouring countries.

Possible transboundary harm should instead feature as one of the determining factors among others, the words "in particular" being replaced by "inter alia".

41. He did not favour the inclusion of draft article 9, paragraph 2, and draft article 10, paragraph 2 bis, both of which tended to give the potentially affected State a right to obstruct the planned activities.

42. Lastly, compulsory rules for the settlement of disputes, especially in framework conventions, should be avoided. The dispute settlement provisions should be flexible enough to allow the States concerned to determine at their own free choice the most efficient means of resolving any issues outstanding between them, in accordance with Article 33 of the Charter of the United Nations. The composition and nature of the fact-finding commission mentioned in draft article 19, paragraph 2, required further clarification.

43. Turning to the topic of unilateral acts of States, he observed that the replies received from States to the Commission's questionnaire had been too few to enable it to take its work further. Materials from Governments about their State practice were still needed. The Commission should not give undue prominence to expectations created by the unilateral act, as compared with the intentions of the author State. That could reduce legal certainty by introducing a highly subjective element into the notion of a unilateral act.

44. **Mrs. Telalian** (Greece), commenting on the topic of reservations to treaties, said that draft guidelines 1.2 and 1.2.1, on the definition of "interpretative declarations" and "conditional interpretative declarations", did not provide clear criteria for distinguishing between the two concepts. Such a distinction would be useful, because a conditional interpretative declaration could be equated to a reservation and produce the same legal effects, whereas an interpretative statement had no legal effects. The bodies monitoring observance of human rights treaties often had to decide on the validity of a declaration, and for that purpose had to determine whether it fell into the first or the second category. Some States parties to the European Framework Convention for the Protection of National Minorities had made a declaration when ratifying it which contained a definition of the term "national minority". The monitoring body for that Convention would find it helpful to have some draft guidelines on how such declarations should be defined. Its work was made easier by the existing draft guidelines concerning reservations on the entire text of a treaty, "across-the-board" reservations, or those limiting the geographical scope of a treaty.

45. She supported the inclusion of draft guideline 1.1.8, on statements made under exclusionary clauses. The procedure of "negotiated reservations" had been used in many treaties, including human rights treaties. Because the consequences of such a reservation could be predicted, questions about its admissibility related only to the circumstances in which it was made or the treaty provisions which it might cover. She would welcome an answer from the Special Rapporteur to the question raised at the previous meeting by the representative of Austria, whether a declaration under article 124 of the Statute of the International Criminal Court fell under draft guideline 1.1.8 and should therefore be treated as a reservation. The question concerning the application of article 21 of the Vienna Convention on the Law of Treaties and the effects of reciprocity which it entailed should be considered with great caution. During the discussions on the draft Vienna Convention in 1969, the Secretary-General of the Council of Europe had pointed to the practice of the organization, according to which reservations did not automatically lead to the rule of reciprocity being applied. The type of declaration to which the representative of Austria had referred could be dealt with by way of a derogation or optional clause.

46. Draft guideline 1.7.1, on alternatives to reservations, was of great practical value, providing for greater flexibility in adherence to treaties and thus encouraging States to participate in them. The procedures described in draft guideline 1.7.2 (Alternatives to interpretative declarations) were less complicated than reservations, and were provided for in many treaties. They included restrictive clauses limiting the obligations imposed by a treaty, derogations or escape clauses, and opting-out clauses. Since they had the same effects as reservations, they should fall under the definition of draft guideline 1.1 and the system of acceptances and objections should not apply to such procedures. They should be classified as reservations expressly authorized by a treaty, under article 20 (1) of the 1969 Vienna Convention. That rule would apply unless the States concerned agreed otherwise.

47. Unilateral statements of the kind described in draft guidelines 1.4.6, 1.4.7 and 1.4.8, did not have the

legal effects of reservations and therefore lay outside the scope of the draft Guide.

48. The question of late reservations had not yet been discussed by the Commission. The Special Rapporteur's approach, based on existing treaty practice, was that States should not formulate late reservations unless the treaty provided for them. However, the practice had not won wide acceptance, and there was a risk of its creating legal uncertainty; moreover, it might run counter to the principle of pacta sunt servanda.

49. In its work the Commission should emphasize the controversial issue of the admissibility of reservations, which underlay many of the questions covered in the draft guidelines.

50. Turning to the question of international liability, she said there was an urgent need to develop rules governing international liability for transboundary harm. The rules should also impose a duty on States to prevent serious transnational environmental harm, as already laid down in Principle 2 of the Rio Declaration and Principle 21 of the Stockholm Declaration. The International Court of Justice, in its Advisory Opinion on the legality of the threat or use of nuclear weapons, had confirmed that duty as a rule of customary international law. The obligation not to cause transboundary harm required States to prevent and minimize the risk of damage arising from activities within their jurisdiction, in particular through environmental impact assessments. If harm nevertheless occurred, it would give rise to international liability. Prevention and reparation were two interrelated aspects of the scheme of international liability. Rules on international liability should be distinguished from obligations arising from wrongful acts, and should be treated as primary rules of international law. She endorsed the Commission's decision to deal with prevention before embarking on the issue of liability, but urged it to begin work on liability at its next session. She welcomed the new draft articles 16 and 17, on emergency preparedness and notification of an emergency, and the new formulation of draft articles 6 and 7 on authorization and environmental impact assessment respectively. However, she agreed with those delegations which had pointed out the need for a mechanism for determining whether a particular activity might cause significant transboundary harm. There was also a need to make use of other international conventions on the environment, especially those covering the region of the Economic Commission for Europe.

51. The draft guidelines should be supplemented by a more elaborate provision for peaceful settlement of disputes, drawn from article 33 of the Convention on the Law of the Non-navigational Uses of International Watercourses.

52. In developing rules on international liability, the Commission should take account of international instruments concluded in the field of civil liability for nuclear accidents. Those instruments incorporated the principle of strict liability and provided for an effective regime of compensation for all loss, including environmental damage.

53. *Mr. Politi (Italy) resumed the Chair.*

54. **Mr. Traoré** (Burkina Faso), referring to chapter IV of the report, said that the time and effort expended on State responsibility testified to the importance and sheer scale of the topic. He hoped the Commission would persevere with its work and that the topic would be finalized in the form of a binding instrument, thus enabling States which were victims of wrongful acts to seek and obtain reparation. A wrongful act inevitably caused injury, being the denial of a rule which preserved certain interests. The draft articles required improvement in certain areas, such as the concept and treatment of countermeasures and the concept of the injured State. He was glad to note that "reparation" covered both material and moral injury. However, he had doubts concerning the term "circumstances precluding wrongfulness" as the title of chapter V of the draft articles, and would prefer "Circumstances precluding responsibility". The lawfulness or otherwise of acts was determined primarily by other rules of international treaty law or customary law, before the rules on responsibility came into play. Only attenuating circumstances could enable the actor to escape responsibility for an act which would otherwise be wrongful.

55. His delegation had some concerns with regard to the topic of diplomatic protection. Being among the countries which had many emigrant citizens living abroad, Burkina Faso was anxious to acquire the legal means to exercise its right to offer them diplomatic protection. Over the past 20 years, it had suffered repeated incursions which purportedly aimed to protect endangered nationals of other sovereign States. It hoped that draft article 2 had not been influenced by

that phenomenon. Its current wording would make it possible for powerful States to use or threaten to use force against another State, which would be a flagrant challenge to the doctrine of State sovereignty embodied in the Charter of the United Nations. His delegation could not accept the creation of a right which it would be unable to exercise and to which it would certainly fall victim. Diplomatic protection must remain a discretionary right of States, and not become a duty incumbent on them, which would be to ignore the international climate and customary practice in the matter. The concept of bona fide naturalization in draft article 5 was not sufficiently clear, and needed more work by the Commission. Draft article 6 was completely ambiguous and should be reworded to make better sense.

56. Turning to the topic of unilateral acts of States, he welcomed the fact that it was being discussed before the draft articles on State responsibility were completed. Unilateral acts derived from the sovereignty of each State, but States could legitimately be expected to assume responsibility for their legal effects. That was made clear in draft articles 1 to 4, but draft article 5 watered down their impact by making it possible for States to shed responsibility for their acts, although their effects might already be felt by other States. A distinction must be drawn between the opposability of the acts in question and the responsibility which might derive from them. He could not understand the purport of draft article 5, paragraph 8. If international law was superior to domestic law, an international act could not be appraised by reference to the norms and principles of a State's domestic law. The factors which could be invoked to render a unilateral act invalid should be restricted. It should also be made clear whether it was the State which formulated the act, or the State which experienced its legal effects, which could invoke its invalidity.

57. On the question of reservations to treaties, his delegation was reluctant to allow reservations which would affect the substantive provisions of treaties or peremptory rules of general international law. He welcomed the work of codification, which would sensitize States to the place of treaties in the international order and the need to preserve at least their substantive provisions.

58. Lastly, on the question of international liability, he observed that cases of transboundary harm already existed, and science must develop more of a conscience in that respect. He hoped the question of cooperation for prevention could be resolved quickly, so that the process of developing the notion of liability and the obligation to compensate for harm could proceed.

59. **Mr. Belinga-Eboutou** (Cameroon) said that he endorsed the Special Rapporteur's new approach to the topic of State responsibility.

60. It was important to prevent the uncontrolled exercise of countermeasures as a tool of foreign policy by powerful States. The obligations of notification and negotiation, without prejudice to the implementation of any dispute settlement procedure, should help to achieve that goal. A distinction must be made between bilateral countermeasures, which were an established element of international law, and multilateral or collective countermeasures, which fell within the ambit of the progressive development thereof.

61. It was dangerous to separate the issue of countermeasures from that of the peaceful settlement of disputes, as had been done in the current version of the draft articles. For example, any State against which countermeasures were taken was likely to consider them disproportionate; thus, the use of countermeasures generally gave rise to a dispute, the settlement of which might require the intervention of an impartial third party.

62. A separate provision on the peaceful settlement of disputes was all the more necessary in the light of the fact that many States, particularly those which were most powerful and therefore most likely to resort to countermeasures, had not made the declaration on compulsory jurisdiction in dispute settlement provided for under Article 36, paragraphs 2 and 5, of the Statute of the International Court of Justice and were not parties to the international conventions on that issue. States subjected to illegal countermeasures must not be left without recourse.

63. The wishes of the injured State played a key role in the taking of collective or multilateral countermeasures, a concept which appeared for the first time in the current version of the commentary to the draft articles. However, in the case of breaches of obligations essential for the protection of the fundamental interests of the international community as a whole (art. 41, para. 1), any State could take countermeasures on behalf of the injured State (art. 54, paras. 1 and 2).

64. He was concerned that draft article 54, which had not been included in the text adopted on first reading, might lead to the taking of multilateral or collective countermeasures simultaneously with other measures taken by the competent United Nations bodies; the draft articles must not be allowed to create overlapping legal regimes that could weaken the Organization as a whole or marginalize the Security Council, particularly in the light of the recent and disturbing tendency of some States to take action, including armed intervention, without the Council's consent. The situations envisaged in draft article 54 were adequately dealt with under Articles 39 to 41 of the Charter of the United Nations, which was the best expression of the will of the community of States.

65. Turning to the issue of diplomatic protection, he proposed minor drafting changes to the French text of draft article 4.

66. He was concerned at the statement in draft article 6 that the State of nationality could exercise diplomatic protection on behalf of an injured national against a State of which the injured person was also a national. The concept of effective or dominant nationality was problematic; in the modern world, it was quite common for people to live abroad for long periods of time without losing their nationality, and in cases of dual nationality it could be difficult to determine which nationality was dominant. Furthermore, individuals must not be permitted to claim first one nationality, then another, as it suited them. In cases such as that envisaged in draft article 6, the injured person should be obliged to make a clear choice, retaining one nationality while renouncing the other. The article required further discussion.

67. While the idea that a State could exercise diplomatic protection on behalf of stateless persons and refugees, embodied in draft article 8, was not without interest from a humanitarian perspective, the two categories of persons should be dealt with in separate paragraphs and it should be clearly stated that diplomatic protection could not be exercised on behalf of refugees against their State of origin.

68. In its work on the topic of unilateral acts of States, the Commission should consider whether the difference between such acts and non-conventional international agreements was based solely on the nature of the act or whether, in some cases, a series of concordant unilateral acts could constitute an agreement. It was also important to consider the legal effects of unilateral acts, bearing in mind the distinction between unilateral acts addressed only to the author State and those addressed to other States.

69. **Ms. Álvarez Núñez** (Cuba) said that the Commission's approach to the topic of diplomatic protection was innovative but controversial. The first report of the Special Rapporteur on the topic (A/CN.4/506 and Corr.1 and Add.1) was thought-provoking; however, her delegation would have preferred a greater focus on theory, practice and international jurisprudence. The establishment of a link between international protection and subsidiary rules of human rights law would undermine many years of practice in the area of State sovereignty.

70. Even the title of the draft articles raised serious questions: it was a fundamental principle of international law that States had a right to protect any of their subjects who had been injured by breaches of international law committed by another State but had been unable to obtain satisfaction by ordinary means. It was at that point that the original dispute between an individual and a State fell within the scope of public international law. The doctrine relative to international protection should not be used as the basis for a new concept, "diplomatic protection", the purpose of which was clearly to set the rights of the individual against the sovereign rights of States and which had been used by some States to attack other States, compromising the latter's territorial integrity and political independence.

71. If the Commission persisted in endowing international protection with new content and scope under the title of "diplomatic protection", it should establish clearly that States had a discretionary right as to the exercise of protection on behalf of natural or legal persons. Furthermore, the threat or use of force was categorically prohibited under Article 2, paragraph 4, of the Charter of the United Nations; it was inadmissible that the Commission had sought to establish exceptions to such a fundamental principle of international law. Lastly, the effective link between the national and the State, which was recognized under international law, must not be ignored or reinterpreted.

72. With respect to the draft articles on unilateral acts of States, she agreed that despite the diversity and complexity of the topic, there were certain core issues such as intentionality, the legal effects of unilateral acts

and their compatibility with international law which merited in-depth consideration. The Commission should also examine unilateral acts of States deriving from the promulgation of internal legislation which had extraterritorial effects on other States and affected international, trade and financial relations between third States and their nationals.

73. The Working Group should first establish general rules common to all unilateral acts; at a later stage, it should develop specific rules for each type of act. She hoped that the Group would not limit itself to carrying out a detailed study of State practice on the topic since the Special Rapporteur's constructive approach could provide a valuable basis for future work.

74. The Guide to Practice on reservations to treaties so far developed through a series of five reports deserved attention, but its practical application for States remained in doubt. Her delegation would like to urge once again that the draft guidelines should not depart from the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions on the law of treaties. The regime of reservations to treaties should not be refashioned sector by sector. Unity of treatment created an element of certainty in legal relations among States. Reservations to human rights treaties did not constitute a special case. Only the parties negotiating a treaty could specify the reservations regime that would apply to it.

75. International liability for injurious consequences arising out of acts not prohibited by international law remained a topic of current interest, in part because of its economic implications for States, and there was a need for codification of rules to ensure that States assumed responsibility for such acts and accepted liability for any harm caused.

76. With regard to the long list of topics the Commission had identified for possible future consideration, some of the questions had already been sufficiently codified and others dealt with issues of interest to a limited number of States. Missing from the list were some issues of fundamental importance to the codification and progressive development of international law and of interest to a great majority of the international community of States, such as the right to development, the norms and principles of international economic relations and the right to peace. Her delegation hoped that the Commission would try to address those concerns.

77. **Mr. Zellweger** (Observer for Switzerland), speaking on the topic of international liability, said that the decision to treat the two aspects of the topic, prevention and remedial measures, separately seemed to have resulted in real progress. The Commission and the Committee currently had before them a set of draft articles on the prevention of transboundary harm that formed an excellent basis for work.

78. He attached particular importance to draft article 15, which set forth the principle of non-discrimination with respect to redress on the basis of nationality, residence or place where the injury might occur. Increasing industrialization and globalization and the use of ever more dangerous or toxic substances was undermining any rationale for preventing a person, natural or juridical, who might be exposed to the risk of significant transboundary harm from having access to redress simply because that person did not live in or have the nationality of the State of origin of the damage. Acceptance of that principle by the international community would in itself constitute remarkable progress.

79. Since the work on prevention was nearing completion, it was time for the Commission to take up the second aspect, that of means of repairing harm. Switzerland had supported the idea of proceeding in two stages in order to facilitate progress, and not in order to leave the decision open as to the feasibility or advisability of taking up the second part. The Commission should take up as soon as possible the question of remedial measures, with its issues of liability and compensation, and then weld the two parts of the topic of international liability into an integrated whole.

80. An objective liability regime, one disengaged from the notion of illegality, should not go so far as to attribute to the State of origin a primary obligation to repair. The obligation should be viewed as subsidiary, applicable to the extent that the author of the harm had a responsibility in the first place to repair it in accordance with the polluter pays principle. In other words, the liability of the State of origin would only be engaged when the author of the harm did not fulfil an obligation to repair.

81. **Mr. Yamada** (Chairman of the International Law Commission) said that the Commission attached the greatest importance to the views conveyed by Governments either in written answers to its

questionnaires or in meetings of the Sixth Committee. Their input represented the essential political ingredient in the Commission's work and a preview of the reception its final products could expect from States. Since the Commission intended to complete the second reading of the draft articles on State responsibility at its next session, the written comments promised by Governments on that topic would be gratefully received.

Agenda item 158: Report of the United Nations Commission on International Trade Law on the work of its thirty-third session (*continued*) (A/C.6/55/L.5)

82. **Mr. Marschik** (Austria), introducing draft resolution A/C.6/55/L.5 on behalf of its sponsors, which had been joined by Rwanda, said that the text was substantially similar to that of General Assembly resolution 54/103. New elements were contained in paragraph 11, which requested the Secretary-General to strengthen the secretariat of the Commission within the bounds of the resources available; paragraph 13, which requested the Secretary-General to submit a report on increasing the membership of the Commission; and paragraph 14, which expressed appreciation to the Secretary of the Commission, who would be retiring on 31 January 2001, for his outstanding contribution to the harmonization of international trade law. The sponsors hoped that the draft resolution could be adopted without a vote.

The meeting rose at 12.45 p.m.